Kertih Port Sdn Bhd v Owners of the Vessel 'Shema'

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO (D3)D4–27–30 OF 2001
ABDUL WAHAB PATAIL J
12 DECEMBER 2008

Civil Procedure — Irregularity — Non-compliance — Service of writ of summons in rem and warrant of arrest on vessel — Service on master of vessel — Whether sufficient compliance of O 70 of the Rules of the High Court 1980 — Whether service defective and ought to be set aside — Rules of the High Court 1980 O 1A, O 70, rr 7 & 10

Shipping and Navigation — Action in rem — Arrest of vessel — Service of writ of summons in rem and warrant of arrest — Service on master of vessel — Whether sufficient compliance with requirements of O 70 — Whether non-compliance with mandatory requirements rendered service defective — Whether it vitiated proceedings — Rules of the High Court 1980 O 1A, O 70 rr 7 & 10

The plaintiff had on or about 10 November 2001 commenced this admiralty in rem action against the vessel 'Shema' to claim for an alleged breach of contract for the hire of two tugboats pursuant to a letter of award executed between the parties. The vessel was arrested at the instance of the plaintiff as a security for its claim under an action filed by the plaintiff. Subsequent to the arrest of the said vessel, the plaintiff had demanded the defendant to furnish alternative security for its claim in the sum of RM2,384,000 to secure the release of the vessel from arrest. After keeping the vessel under arrest for about 104 days, the plaintiff filed a notice of discontinuance of the action and procured the release of the vessel from arrest. In the meantime, the defendant had applied to set aside the writ and warrant of arrest and for an order for sheriff to maintain the vessel pending hearing before this court. The defendant alleged that the execution of the warrant of arrest against the vessel was wrongful and without basis. Further, the arrest had left the defendant without any reparation, in particular as to costs of the action and/or recovery of all unnecessary and wasted expenses incurred by the defendant whilst the vessel was under arrest. Accordingly, the defendant sought an order, inter alia, that all wasted and unnecessary expenses incurred by them whilst the vessel was under arrest be assessed and paid by the plaintiff as sheriff's costs and expenses. The court had to consider the following issues namely; (i) whether

the admiralty jurisdiction of the court had been wrongly and/or improperly invoked by the plaintiff in that the writ of summons in rem and warrant of arrest issued against the vessel and the service thereof must be set aside, and (ii) whether the defendant was entitled to damages for the wrongful arrest of the vessel. The first issue was founded upon the argument that the service of the writ of summons in rem and the warrant of arrest on the vessel was bad in law for failure to comply with the requirements set in the Rules of the High Court 1980 O 70 rr 7 and 10. In the instant case, the writ of summons in rem was served on the master of the vessel at Port Klang.

Held, allowing the defendant's application in part:

(1) Both rr 7 and 10 of O 70 used the word 'shall'. This means that the act specified was mandatory. No other form of service was prescribed. It follows that it must be complied with. The prescribed service under rr 7 and 10 are clearly consistent with the in rem nature of the action. Service upon the master of the vessel was not in rem in nature upon the vessel but upon the master (see paras 13–14).

(2) The justice of the case did not warrant the acceptance of service upon the master of the vessel as sufficient compliance with O 70. Upon failure to comply with the mandatory requirement, the consequence was that the service of the writ in rem and the warrant on the master of the ship was defective and ought to be set aside (see paras 22–23).

(3) Foreign ships, owners and parties shipping goods expect compliance with the letter of the rules, for they conduct their operations on that basis. Tolerance of defective application of the rules to allow the use of the writ in rem, to hold a ship while a claim and negotiations for settlement is made, and then releasing the same at will 104 days later, created the image of a nation which allows its laws and rules to be used for what may be termed collateral if not improper purposes, and thus damaged Malaysia's reputation generally as a trading nation. That was too high a price to pay by the nation for one plaintiff (see para 16).

[Bahasa Malaysia summary

Plaintif telah pada 10 November 2001 memulakan tindakan admiralti in rem ini terhadap kapal 'Shema' bagi menuntut kemungkiran kontrak bagi penyewaan dua kapal tunda menurut surat award yang dilaksanakan di antara pihak-pihak. Kapal tersebut telah ditahan atas permintaan plaintif sebagai jaminan tuntutannya di bawah tindakan yang telah difailkan oleh plaintif. Lanjutan daripada penahanan kapal tersebut, plaintif telah menuntut kepada defendan untuk menyediakan jaminan alternatif bagi tuntutannya sebanyak RM2,384,000 bagi menjamin pelepasan kapal tersebut dari ditahan. Selepas

menyimpan kapal tersebut dalam tahanan selama lebih kurang 104 hari, plaintif telah memfailkan notis penamatan tindakan dan mendapat pelepasan kapal tersebut daripada tahanan. Sementara itu, defendan telah memohon untuk mengetepikan writ dan waran penahanan dan perintah bagi sherif untuk mengekalkan kapal tersebut sementara pendengaran di hadapan mahkamah ini. Defendan mendakwa bahawa perlaksanaan waran penahanan terhadap kapal tersebut adalah salah dan tidak berasas. Selanjutnya, penahanan tersebut telah menyebabkan defendan tanpa pampasan, terutama berkenaan dengan kos tindakan dan/atau mendapatkan kembali kesemua perbelanjaan yang tidak perlu dan terbuang yang ditanggung oleh defendan semasa kapal tersebut ditahan. Oleh itu, defendan memohon satu perintah, antara lain, bahawa kesemua perbelanjaan yang terbuang dan tidak perlu yang ditanggung oleh mereka semasa kapal tersebut ditahan ditaksirkan dan dibayar oleh plaintif sebagai kos dan perbelanjaan Syerif. Mahkamah perlu mempertimbangkan isu-isu berikut iaitu; (i) sama ada bidang kuasa mahkamah admiralti telah digunakan secara salah dan/atau tidak wajar oleh plaintif di dalam writ saman in rem dan waran penahanan yang dikeluarkan terhadap kapal dan penyampaiannya mestilah diketepikan, dan (ii) sama ada defendan berhak kepada ganti rugi bagi penahanan salah kapal tersebut. Isu pertama adalah berdasarkan ke atas pernyataan bahawa penyampaian writ saman in rem dan waran penahanan ke atas kapal tersebut adalah salah dalam undang-undang disebabkan kegagalan untuk memenuhi keperluan yang diperuntukkan di dalam A 70 kk 70 dan 10 Kaedah-Kaedah Mahkamah Tinggi 1980. Dalam kes ini, writ saman in rem telah disampaikan kepada master kapal tersebut di Pelabuhan Klang.

Diputuskan, membenarkan sebahagian permohonan defendan:

(1) Kedua-dua kk 7 dan 10 A 70, menggunakan perkataan 'shall'. Ini bermaksud tindakan yang dinyatakan adalah mandatori. Tiada bentuk penyampaian lain diperuntukkan. Ia diikuti bahawa ianya mestilah dipenuhi. Penyampaian yang diperuntukkan di bawah kk 7 dan 10 adalah jelas konsisten dengan sifat tindakan in rem. Penyampaian kepada master kapal adalah tidak bersifat in rem terhadap kapal tersebut tetapi terhadap master (lihat perenggan 13–14).

(2) Keadilan kes tidak memerlukan penerimaan penyampaian terhadap master kapal tersebut sebagai mencukupi pematuhan A 70. Apabila kegagalan untuk mematuhi keperluan mandatori, akibatnya adalah penyampaian writ in rem dan waran ke atas master kapal tersebut adalah cacat dan seharusnya diketepikan (lihat perenggan 22–23).

(3) Kapal asing, pemilik dan pihak-pihak barangan perkapalan menjangka pematuhan dengan perkara yang termaktub dalam peraturan, bagi mereka menjalankan operasi mereka berdasarkan perkara tersebut.

Toleransi permohonan peraturan yang cacat bagi membenarkan penggunaan writ in rem, bagi menahan satu-satu kapal semasa tuntutan dan perundingan penyelesaian dibuat, dan kemudian melepaskannya sesuka hati 104 hari kemudian, membentuk imej sebuah negara yang membenarkan undang-undang dan peraturan-peraturannya digunakan sebagai apa yang boleh dikatakan sebagai koleteral jika tidak tujuan tidak baik, dan oleh itu merosakkan reputasi Malaysia secara umumnya sebagai negara perdagangan. Ini adalah nilai yang tidak wajar ditanggung oleh negara semata-mata untuk seorang plaintif (lihat perenggan 16).]

Notes

For cases on arrest of vessel, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 997–1166.

For cases on irregularity generally, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3702–3738.

Cases referred to

Hamp-Adams v Hall [1911] 2 KB 942, CA (refd)

Mohamed Suboh v Devadas [1981] 1 MLJ 136; [1980] 1 LNS 201, FC (refd)

PP v Yap Min Woie [1995] 1 MLJ 169, FC (refd)

PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd [1958] MLJ 113, HC (refd)

'Ralph Misener', The [1997] ACWSJ LEXIS 153296; [1997] ACWSJ 413748; 68 ACWS (3d) 803 (refd)

Rolimpex Centrala Handlu Zaranicnego, Willy Bruns and R Kamstra (Hull) Ltd v Prins Bernhard (Owners), The Prins Bernhard [1963] 2 LLR 236 (refd)

Veerasingam v PP [1958] MLJ 76, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 1A, O 70 rr 7, 10

TH Liew (SY Ho with him) (TH Liew & Partners) for the plaintiff.
Mathew Kurien (Sativale Mathew Arun) for the defendant.

Abdul Wahab Patail J:

[1] The matters before the court were as follows:

(a) Enclosure 15: the defendant's application to set aside writ and warrant of arrest;

(b) Enclosure 18: the defendant's application for orders for sheriff to maintain vessel; and

(c) Enclosure 47: the defendant's application to set aside notice of discontinuance.

[2] The plaintiff Kertih Port Sdn Bhd had on or about 10 November 2001 commenced this admiralty in rem action against the vessel 'Shema' ('the vessel') for a claim for an alleged breach of contract for the hire of two tugboats pursuant to a letter of award executed between the parties. The vessel was arrested at the instance of the plaintiff as a security for its claim under an action filed by the plaintiff. The vessel was arrested at Port Klang on 10 November 2001, at the request of the plaintiff. On or about 12 November 2001, Messrs Liow & Co, the former solicitors of the defendant in this action, issued an immediate notice to the plaintiff's solicitors informing that the execution of the warrant of arrest against the vessel 'Shema' was wrongful and without basis.

[3] Subsequent to the arrest of the said vessel in this action, the plaintiff through its solicitors had on 13 November 2001 and 20 November 2001 demanded the defendant to furnish alternative security for its claim in the sum of RM2,384,000 to secure the release of the vessel 'Shema' from arrest.

[4] After keeping the vessel under arrest for about 104 days, the plaintiff filed a notice of discontinuance of the action and procured the release of the vessel from arrest. At the time of filing of the notice of discontinuance and release, encl nos 15 and 18 filed by the defendant, were pending hearing before this court.

[5] The abrupt discontinuance of the action by the plaintiff left the defendant without any reparation, in particular as to costs of the action and/or recovery of all unnecessary and wasted expenses incurred by the defendant whilst the vessel was under arrest for about 104 days. Accordingly, the defendant by encl 47, sought an order that the plaintiff's notice of discontinuance be set aside and that all wasted and unnecessary expenses incurred by the defendant whilst the vessel under arrest be assessed and paid by the plaintiff as sheriff's costs and expenses.

[6] The notice of discontinuance was set aside by agreement of the parties. Mr TH Liew for the plaintiff informed the court there was no objection to payment of costs to the date of discontinuance. Setting aside the notice of discontinuance, the court deferred decision on other prayers in encl 47 until decision on encll 15 and 18. Except for prayer 5, the remaining prayers in encl 47 are similar to prayers in encll 15 and 18. Hence, prayer 5 was considered as an alternative prayer to damages for wrongful arrest of the vessel. Further, the defendant did not proceed with prayers 1, 5 and 7 of encl 15 for reason they had become academic. Similarly, since the plaintiff

had voluntarily released the vessel from arrest, the majority of prayers sought in encl 18, save for prayer 7 pertaining to the issue of costs and unnecessary/wasted expenses whilst the vessel was under arrest, had also become academic.

[7] The remaining prayers pertain to prayers 2, 3, 4 and 6 of encl 15, prayer 7 of encl 18 and prayer 5 of encl 47, and the two main issues are:

(a) whether the admiralty jurisdiction of this court has been wrongly and/or improperly invoked by the plaintiff in that the writ of summons in rem and warrant of arrest issued against the vessel 'Shema' and the service thereof must be set aside; and

(b) whether the defendant is entitled to damages for the wrongful arrest and wrongful continuance of arrest of the vessel 'Shema' alternatively defendant be reimbursed of wasted and unnecessary expenses whilst the vessel under arrest at the instance of the plaintiff.

[8] The first issue was founded upon the argument that the service of the writ of summons in rem and the warrant of arrest on the vessel 'Shema' was bad in law since O 70 rr 7 and 10 of the Rules of the High Court 1980 which prescribe the rules as to the service of a writ in rem and the execution of the warrant of arrest had not been followed.

[9] The said r 7 contains a mandatory requirement that the writ must be served on the property against which the action is brought. Rule 10 provides that, service of a warrant of arrest or writ in an action in rem against a ship, freight or cargo shall be effected by: (a) affixing the warrant or writ for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure; and (b) on removing the warrant or writ, leaving a copy of it affixed (in the case of the warrant) in its place or (in the case of the writ) on a sheltered, conspicuous part of the ship. However, the affidavit of service of the writ of summons in rem of Mohamad Nasir bin Mohd and Zainuddin bin Ismail affirmed on 12 November 2001 shows that the writ in rem was served on the master of the vessel 'Shema' at Port Klang on 10 November 2001 and not as required under rr 7 and 10 of O 70 of the RHC.

[10] I have considered the question whether the non-compliance is mere technical non-compliance. Now, O 1A of the RHC came into effect under PU(A) 197/2002 from 17 May 2002. Hence, it is not applicable to this case. The general wisdom seems to suggest that prior to O 1A the rules were applied strictly, resulting in injustice, hence the need for O 1A. A strict, literal and blind application of the rules of court has never been the law. Guidance

in the exercise of judicial discretion under the rules of court had been set out by no less than Thomson CJ in *Veerasingam v Public Prosecutor* [1958] MLJ 76:

> Clearly, to exercise his discretion properly the judge must apply his mind to all the relevant material. He must consider the circumstances of the original trial. He must consider the original petition of appeal. And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to that original petition of appeal. He must consider his own powers as to such matters as the granting of adjournment and the requiring of notice to be given. And then he must exercise his discretion as he sees fit in order that substantial justice may be done in the matter. It may be that he may find it helpful to look at what has been done in some other case by some other judge but if he does he must be careful to look at what that other judge has done merely as an illustration and not as laying down any judicial precedent.

[11] This passage was quoted and approved by the Federal Court in *Mohamed Suboh v Devadas* [1981] 1 MLJ 136; [1980] 1 LNS 201 where it was stated that even though the decision of Thomson CJ was in a criminal reference, it applied with equal force to matters of civil procedure.

[12] The decision in *Mohamed Suboh v Devadas* contained the grounds of decision of Ajaib Singh J who set out four categories of rules:

> I can think of four categories of the rules. First the rules which are minor or technical. Non-compliance with such rules will not vitiate the proceedings. For example failure to give notice of intention to use any affidavit under O 38 r 20 of the Rules of the Supreme Court may well be considered as a mere irregularity not rendering the proceedings void. In the second category are those rules which prescribe periods of time within which to file and deliver pleadings or other documents in civil proceedings. Extension of time is generally granted in such a case on terms if the granting of the extension does not put the other party to the proceedings at any disadvantage. The third category of rules are those which must be strictly complied with before a person can obtain any relief in court. Order 14 is a good example of this category of rules. The affidavit in support of an application for summary judgment must fulfil strictly the conditions set out in r 1(a) of O 14. If the affidavit is deficient for want of compliance with this rule the application for summary judgment will be dismissed unless the position is rectified by a supplementary affidavit. Lastly there are the rules which relate to civil appeals from the decisions of the lower courts. These rules prescribe the time within which to file a notice of appeal and the memorandum of appeal and the service thereof and of the appeal record on the respondent to the appeal. These rules must be complied with. In the interest of justice however the court may extend time but only if sufficient ground is shown for the delay. What amounts to sufficient ground will depend on the facts and circumstances of the particular case.

[13] Both rr 7 and 10 use the word 'shall'. Its use means that the act specified is mandatory: see *Mohamed Suboh v Devadas* [1981] 1 MLJ 136; [1980] 1 LNS 201: *Public Prosecutor v Yap Min Woie* [1995] 1 MLJ 169 (FC).

[14] No other form of service was prescribed. It follows it must be complied with. The prescribed service under rr 7 and 10 are clearly consistent with the in rem nature of the action. Service upon the master of the vessel is not in rem in nature upon the vessel but upon the master. In *Rolimpex Centrala Handlu Zaranicnego, Willy Bruns and R Kamstra (Hull) Ltd v Prins Bernhard (Owners), The Prins Bernhard* [1963] 2 LLR 236 service on the master, which was impressed on him as good service, the judge said 'it is too great a departure from the recognised and long established practice'. Caution must be placed upon reliance on the Canadian case of *The 'Ralph Misener'* [1997] ACWSJ LEXIS 153296; [1997] ACWSJ 413748; 68 ACWS (3d) 803 as it does not appear to be an in rem process.

[15] As to non-compliance with, in particular, a mandatory rule of court, brings to mind *PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd* [1958] MLJ 113 in which the following extract from the decision of Rigby J in *Hamp-Adams v Hall* [1911] 2 KB 942 was set out:

> On the authorities it seems abundantly clear, therefore, that where the law provides a particular method or form of procedure for effecting service, or a particular place at which, or to which, service may be effected, then there must be strict compliance with those provisions, and the court will set aside a judgment obtained by default where the requirements have not been complied with.

[16] I take into consideration also the fact that the writ in summons in rem is a special procedure applied in rem to ships that move in and out of Malaysia. These ships are not necessarily registered in Malaysia or owned by Malaysians, but their entry into and departure out of Malaysia on time and on schedule affect the very lifeblood of trade upon which the modern global economy, and particularly that of Malaysia is dependent. Foreign ships, owners, and parties shipping goods expect compliance with the letter of the rules, for they conduct their operations on that basis. Tolerance of defective application of the rules to allow the use of the writ in rem, to hold a ship while a claim and negotiations for settlement is made, and then releasing the same at will 104 days later, creates the image of a nation which allows its laws and rules to be used for what may be termed collateral if not improper purposes, and thus damage Malaysia's reputation generally as a trading nation. That is, in my view, too high a price to pay by the nation for one plaintiff.

A **[17]** Even, if O 1A is applied, it must be observed that nothing in O 1A suggests all breaches must be treated as mere irregularities. Order 1A requires consideration of the justice of the case. In such case, the categories set out by Ajaib Singh J above, in my view, remain relevant in the consideration of the justice of the case.

B

[18] If the arrest and subsequent unilateral release 104 days later of the vessel did not raise legal eyebrows, that the plaintiff having drawn down upon a sum of RM379,000 on two bank guarantees or performance bonds both dated 14 August 2000, on 27 June 2001 and 25 July 2001 returned the sum
C to the bank on 20 February 2000. The defendant received this information on 9 April 2002 not from the plaintiff but from the bank. The calls upon the guarantee was made even before the plaintiff issued its solicitor's notice of termination of contract to the defendant on 11 September 2001.

D

[19] A consideration of the justice of the case in whether to accept service upon the master of the vessel in Port Klang as sufficient compliance with the requirements of O 70 of the RHC would not be complete if one does not touch upon the background that precipitated the plaintiff's actions.

E

[20] On 10 October 2001, the defendant had commenced a civil action against the plaintiff in the High Court of Malaya (Commercial Division) at Kuala Lumpur Suit No D5–22–1768 of 2001 claiming damages for breach or breaches of contract by the plaintiff under the letter of award dated
F 15 December 1997. The plaintiff contended in its defence in the Dagang 5 suit it was the defendant who had breached the terms of the said letter of award and not the plaintiff. The plaintiff commenced this action on 10 November 2001. The day before that the plaintiff had filed its defence in the Dagang 5 suit. From a perusal of the endorsement on the writ of
G summons and the pleadings filed in the Dagang 5 suit, it appears clear that the cause of action, facts, subject matter, the parties and issues for determination are identical to the writ in rem in this action. The Dagang 5 suit was not disclosed by the plaintiff. This does not assist the plaintiff as to the bona fides of its action in this suit. The court cannot accept the plaintiff's
H submission that it could employ the legal process to obtain maximum advantage. The process of the courts are provided for the purpose of being employed in good faith for the expeditious and economical resolution of bona fide disputes, by focusing firstly upon getting the facts right in order to deliver a resolution that is fair and just. It is not a tool for advantage.

I

[21] The original dispute between the parties arose from the occurrence of the financial crisis in 1997 between the time of negotiations and the issue of the letter of award. As a result of the financial crisis, an unexpected occurrence took place. The Government of Malaysia altered the exchange

rates. It affected contract pricing. The change in the exchange rate was not the variations in the ordinary course but from about RM2.45 it was altered to RM3.58 to the US dollar.

[22] In all the circumstances, the justice of the case does not warrant the acceptance of service upon the master of the vessel as sufficient compliance with O 70.

[23] Upon failure to comply with the mandatory requirement, the consequence is that the service of the writ in rem and the warrant on the master of the ship is defective and liable to be set aside.

[24] In the event, the court allowed prayers 2, 3, 6 and 8 of encl 15 and prayer 5 of encl 47.

Defendant's application allowed in part.

Reported by Ashgar Ali Ali Mohamed